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IN THE

Supreme Court of the United States

October Term, 1964

No. 1077 [redacted]

DAVID LEVY,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

RESPONDENT'S BRIEF IN OPPOSITION

FRANK S. HOGAN
District Attorney
New York County

H. RICHARD UVILLER
RAYMOND S. HACK
155 Leonard Street
New York, N. Y. 10013
Assistant District Attorneys
Of Counsel

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RESPONDENT'S BRIEF IN OPPOSITION

Preliminary Statement

This is a petition for a writ of certiorari to the Court of Appeals of the State of New York, to review a judgment of that court rendered February 4, 1965, modifying a judgment of the Appellate Division, First Department, rendered December 5, 1963, which had affirmed a judgment of the Supreme Court, New York County, rendered November 27, 1962, convicting petitioner and two others of the crimes of kidnapping [N. Y. Penal Law §1250], robbery

in the first degree [N. Y. Penal Law §2124] and criminally possessing a pistol [N. Y. Penal Law §1897]. The Court of Appeals reversed the convictions for kidnapping, dismissing the kidnapping counts of the indictment, and affirmed the judgments convicting petitioner of the crimes of robbery in the first degree and criminally possessing a pistol.

Question Presented

Was the petitioner deprived of due process of law and the right of confrontation when a witness for the prosecution initially claimed his privilege against self-incrimination and refused to answer questions inculpating petitioner, but later testified to the same matters embodied in those questions?

Statement of the Case

The Crime

In the early morning hours of December 31, 1961, Mr. and Mrs. John Mosler, stopping their car in front of their home at 1035 Fifth Avenue in New York City, were accosted by two armed men, John Richlia and the co-defendant Louis D'Antonio, who forced their way into the Moslers' automobile. Holding their victims at gun point, the bandits deprived Mrs. Mosler of valuable rings and earrings and Mr. Mosler of his wallet. They continued to drive the imprisoned victims around the east side of Manhattan until they reached the appointed rendezvous where confederates waited in another car. In the other car were

the petitioner, David Levy, who had planned and supervised the operation and his lieutenant, the co-defendant, Patrick Maloney.

In addition to the Moslers' account of what occurred, the guilt of the defendants was proved by the testimony of the accomplice, Richlia, who had pleaded guilty to third degree robbery and was awaiting sentence. Richlia was fully corroborated by the testimony of Levy's paramour, Imogene Ruh, who overheard the plotting of the crime. Her testimony with respect to Levy's possession of the pistols, was corroborated by the witness Daniel Cohen.

The Questioning of the Witness Daniel Cohen

Daniel Cohen was called as a witness by the prosecution. After stating his name, residence and marital status he asked to speak to the judge. Out of the hearing of the jurors, he told the court that he had a pending charge in the Bronx involving the weapons in this case, and had been advised by his attorney to refuse to answer questions (2359-62).* The court declared a recess, and had marked for identification a sworn statement taken by the prosecutor from the witness on July 20, 1962 (2364-70). The court then read into the record, out of the jury's presence, a portion of the statement which included a promise by the assistant district attorney that the witness would be granted immunity on the disposal of the guns. Although the immunity would not extend to the possession of the gun for which the witness was indicted in the Bronx, Cohen had agreed to testify (2370-6). As to the questions and answers which followed, the court opined that the wit-

* References, unless otherwise noted, are to the folios of the printed record.

ness had voluntarily waived his privilege and, in addition, had immunity pursuant to New York Penal Law Section 2447 in "this jurisdiction only" (2376-81).

After warning Cohen that if he did not answer the questions put to him by the district attorney and answer them truthfully, he would be subject to charges of perjury and contempt, the court brought the jury back. A series of questions relating to the taking of the prior statement was asked which the witness again declined to answer. The court, noting that Cohen was "definitely a hostile witness," instructed the prosecutor to ask him whether he recalled being asked certain questions and giving certain answers (2394, 2396-7). Complying, the prosecutor sought to break Cohen's obstinate silence by asking whether he recalled questions and answers previously made, as reflected by the statement. In each instance, the witness stood fast, asserting that his answer might tend to degrade or incriminate himself, adding, in one case, that an answer might "get me killed" (2397-2480). The court told the witness that his refusal consisted of contempt of court (2414). Then, in the absence of the jurors, who had recessed for lunch, he was held in bail by the court on the charge of contempt (2481-9).

Before the jury returned from lunch, the court advised Cohen that the immunity granted hitherto, encompassed all of New York State including Bronx County. Mr. Theodore Rosenberg, who had previously represented Cohen, conferred with him, and informed the court that Cohen was now advised by him as to his legal obligations to answer questions (2510-14). The jury was brought back,

and Cohen was asked a question by the prosecutor. Upon his refusal to answer despite the court's direction, and his further statement that he would answer no questions at all, the court stated that no purpose would be served by asking him any additional questions. The court then addressed the jury:

> "The Court: Now, I wish to say this to the jury most emphatically. Ladies and gentlemen of the jury, before this trial actually began and evidence was adduced, I instructed you, and on numerous occasions during the trial I instructed you, and I now instruct you again, that a question in and of itself is evidence of nothing.
>
> "All of the questions asked by the District Attorney which were not answered by the witness are to be disregarded by you as having no significance and being of no probative value, and I instruct you and admonish you that they are not evidence in the case to be considered in any way, shape or manner of form. Any of the questions that the District Attorney may have asked which elicited no answer from the witness, or which resulted in a refusal to answer by the witness, are not evidence. You are to draw no inference therefrom; you are not to surmise what the answer mig' t have been, and you are to disregard them and strike them from your minds as much as you possibly can, and as far as humanly possible for you to do so, and you are to decide this case on that evidence which remains in the case.
>
> "The District Attorney was permitted to ask a great many questions in the hope that he might give some testimony that you could consider as evidence, but insofar as he has not done so, you are admonished to disregard any of the questions, take no implication

therefrom and regard those questions as no part of the case" (2525-8).

Another witness was called, after which Cohen was returned and did testify. In essence, he testified that he assisted Levy in the disposal of the weapons which Levy had kept in his apartment (2704-37). This testimony covered the very same matters previously stated in the interview with the prosecutor about which he had been asked earlier and had refused to testify.

Summary of Argument

The fact that the witness who had originally refused to testify, later did testify to the very same matters about which he had previously claimed his privilege against self-incrimination, destroys any claim of unconstitutionality. By virtue of this testimony, petitioner had a full opportunity to cross-examine and thus suffered no impairment of his right of confrontation. Nor was it improper for the trial court to permit the prosecutor to question the witness despite the initial refusal to testify. Both court and prosecutor justifiably sought to compel the witness to testify pursuant to a grant of immunity and in accordance with the witness' sworn promise to testify. The continued questioning, under such circumstances, served legitimate state purposes, and in no way unfairly prejudiced the petitioner, especially since the witness did in fact later testify pursuant to a binding grant of immunity.

ARGUMENT

The fact that a witness for the prosecution was asked questions inculpating the petitioner, after the witness had claimed his privilege against self-incrimination, did not deprive petitioner of due process of law and the right of confrontation, since the witness later did testify. Nor was the initial questioning of the witness improper.

According to the petitioner, the incident involving the witness Cohen resulted in the destruction of his right to a fair trial, in that he was deprived of due process of law and the right to effective cross-examination. Both the calling and the questioning of the witness, it is claimed, amounted to error of constitutional dimension. Support for this contention is sought in a number of federal and state cases [*Douglas* v. *Alabama,* —— U. S. —— (1965), 85 S. Ct. 1074 (1965); *Fletcher* v. *United States,* 332 F. 2d 724 (C. A. D. C. 1964); *United States* v. *Maloney,* 262 F. 2d 535 (2d Cir. 1959); *United States* v. *Tucker,* 267 F. 2d 212 (3d Cir. 1959); *State* v. *Dinsio,* 200 N. E. 2d 467 (Ohio 1964); *Kaplow* v. *State,* 157 So. 2d 862 (Fla. 1963); *DeGesualdo* v. *People,* 364 P. 2d 374 (Colo. 1961); *Washburn* v. *State,* 299 S. W. 2d 706 (Tex. 1956)], all of which involve, under varying circumstances, the claim of privilege against self-incrimination by a witness, and all of which are readily distinguishable from the case at bar.

In the cited cases, the questioning of the justifiably fearful witnesses served no purpose other than to prejudice the defendant unfairly. Here, as explained below, the purpose of the questioning was to uncover the witness'

reluctance and hostility and to compel him to testify pursuant to a grant of immunity and in compliance with his sworn promise to do so. That the examination which uncovered this reluctance and hostility and which culminated in his testifying was in no way "evidence" in the case, was expressly acknowledged by the court both in colloquy at the bench and in the statement to the jury, quoted above. The evidence in the case was his later testimony, given under a complete grant of immunity, which obviates any contention of prejudice resulting from the means employed to obtain it.

Indeed, it is this latter circumstance which, in itself, constitutes a complete refutation of the petitioner's claim. The reason for this is plain. Permitting a prosecutor to question a witness who is claiming his privilege against self-incrimination creates the possibility of placing before the jury "inferences * * * not subject to cross-examination" [*Namet* v. *United States*, 373 U. S. 179, 187 (1963)]. If, for example, the prosecutor knowingly calls an alleged accomplice to the stand to secure from him a refusal to testify and uses his presence on the stand as a pretense for reading to the jury an alleged confession of the witness that is inadmissible against the defendant, there exists just such a danger [see *Douglas* v. *State*, *supra*]. But that danger dissolves when the witness does, in fact, testify to the very same matter about which he previously had claimed his privilege. The "inferences" are no longer "inferences" but have become evidence: assertions of fact from the lips of the witness about which the witness may be, and in this case was cross-examined.

Realizing that the *Douglas* case is controlling, petitioner repeatedly asserts that Cohen answered only "some" of the questions asked previously, thus leaving some prejudicial gap between what was testified to and what was given in the statement to the prosecutor. This argument completely misses the point of *Douglas* and, in any event, is belied by the record. Indeed, in attempting to document the allegation, Levy is able to cite only three questions which he claims were asked while Cohen was refusing to testify but not later when he did testify. One question—whether he gave any of the weapons to one "Muscles" Futterman—was not part of the interview, and had no reference to any of the defendants on trial. The statement of Cohen that he had given the weapon to a known killer, a "tough guy" and that he was in fear of his life also did not refer to any of the defendants. And the third question, dealing with a conversation between Levy and Cohen was testified to by Cohen, though his testimony on this point was not as detailed as his prior statement to the prosecutor, a fact which could only have benefited Levy (*cf.* 2451-2 and 2723). In short, as noted by the New York Court of Appeals, there was no "prejudicial differential between those asked and not answered and those asked and later answered" [*People* v. *Levy,* 15 N. Y. 2d 159, 166 (1965)].

Prejudiced, indeed, was the defendant Levy, but only insofar as Cohen's testimony touched upon Levy's possession of the guns. Contrary to petitioner's bald and false assertion that Cohen participated in the robbery [petitioner's brief, pp. 4-5] Cohen was not an accomplice of Levy or any of the other defendants, and his testimony in-

culpated no defendant other than Levy. The testimony of the witness, as well as his prior statement, related almost entirely to Count 9 of the indictment—i.e. unlawful possession of weapons. Cohen was merely a necessary link in tracing the weapons which Levy had in his home on December 30, 1961. That this was the sole purpose of his testimony was acknowledged by the defendant himself in his argument in the Appellate Division that Cohen's testimony was incapable of connecting Levy with the kidnapping (Levy's brief in Appellate Division, p. 24), and was implied by the prosecutor in his summation (4851-3, 4856, 4863). And it was this testimony that was used against the petitioner, not his prior refusal to testify.

Moreover, the issue under *Douglas* is not whether a prejudicial differential existed, but whether the defendant had an opportunity to cross-examine the witness about the truth of the matters allegedly asserted in the statement, as well as the making of the statement itself. In *Douglas* the Court held that the "petitioner's inability to cross-examine [the witness] as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause" [*Douglas* v. *Alabama*, —— U. S. ——, 85 S. Ct. at 1077]. Petitioner, in this case, suffered no such disability.

Aside from the question of whether petitioner was deprived of his right of confrontation, it is urged that calling Cohen and questioning him in the face of his refusal to testify was so unfairly prejudicial to the defendant that it could not be cured by the subsequent testimony. *Kaplow* v. *State*, 157 So. 2d 862 (Fla. 1963), the only case cited in

support of this proposition, is not apposite. There, the prosecutor, over objection, called as his witness one of the defendants who was then on trial. Subsequently, that defendant testified on his own behalf. This fact, the Florida intermediate appellate court felt, could not undo the impropriety of the state's having compelled a *defendant* to claim his privilege against self-incrimination. Since neither judge nor prosecutor could constitutionally comment on a defendant's refusal or failure to testify [*Griffin* v. *California*, —— U. S. —— (1965), 33 U. S. L. W. 4382 (1965)], it hardly seems reasonable to permit the prosecutor to create the situation where the jury is witness to the refusal itself. More to the point is the opinion of this Court in *Namet* v. *United States*, 373 U. S. 179 (1963). Regarding the case before it as involving only a claim of evidentiary trial error, the Court summarized the lower federal court decisions, as follows:

> "None of the several decisions dealing with this question suggests that reversible error is invariably committed whenever a witness claims his privilege not to answer. Rather, the lower courts have looked to the surrounding circumstances in each case, focusing primarily on two factors, each of which suggests a distinct ground of error. First, since courts have indicated that error may be based upon a concept of prosecutorial misconduct, when the Government makes a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege * * * A second theory seems to rest upon the conclusion that, in the circumstances of a given case, inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination and thus unfairly prejudiced the defendant" (pp. 186-7).

Where the prosecution admitted knowing that key witnesses could validly invoke the privilege and intended to do so, but nevertheless called and questioned them, or where the prosecution's closing argument attempted to make adverse inferences from their refusal to testify, the courts have found reversible error (*id.* at 186-7). But where the incident was a minor lapse in a long trial, the courts have failed to find reversible error. "And even when the objectionable inferences might have been found prejudicial, it has been held that instructions to the jury to disregard them sufficiently cured the error" (*id.* at 187).

Applying these guidelines, it is clear that there was neither prosecutorial misconduct nor unfair prejudice. The instructions to the jury were prompt and complete; it was the sole incident in a long trial; and no attempt was made to use the refusal to testify adversely against the defendants.

Moreover, the prosecutor did not believe that Cohen would or could claim his privilege. Here, "there is no indication that the witness(es) had ever claimed the privilege in any interrogation concerning the [crime] involved in this case" [*Commonwealth* v. *Donatelli*, 198 A. 2d 338, 341 (Pa. 1964)]. On the contrary, the witness had at all times prior to taking the stand agreed to testify, and, in fact, had sworn previously that he would testify (2376, 2551); his refusal to do so came as a complete surprise to the prosecutor (2552; *cf. Fletcher* v. *United States*, 322 F. 2d 724 (D. C. 1964); *United States* v. *Maloney*, *supra* at 376). Thus, reliance upon *Washburn* v. *State*, *supra*, is misplaced, for Texas law bars the prosecutor from calling

as a witness a co-defendant or accomplice "Unless the witness has agreed to turn state's evidence" [18 Tex. Jur. 238, Sec. 142, cited in *Washburn* v. *State, supra,* at 708), which is, of course, precisely what Cohen had sworn to do.

Yet, despite this promise, the defendant claims that when Cohen, having been called to the stand, and having informed the court of his intention to refuse to testify, it was error for the court to permit and indeed to order the prosecutor to continue. "But certainly the prosecutor need not accept at face value every asserted claim of privilege, no matter how frivolous" [*Namet* v. *United States, supra,* at 188]. In this case the prosecutor and the court had every reason to regard Cohen's claim as frivolous. Initially, both the prosecutor and the court did not believe that Cohen was entitled to claim his privilege because of the grant of immunity. Cohen himself had agreed to testify knowing that the immunity offered was not intended to extend to the Bronx (2375-6). Moreover, his sworn statement would be just as admissible against him at a later trial as would his testimony. As noted by the prosecutor, "this witness has already incriminated himself when he answered questions posed by me as District Attorney in the office. He signed and initialed each of these pages. He has sworn before a notary public as to the truth of those pages" (2363). To the extent, therefore, that the prosecutor's good faith is in issue it is clear that his questioning of the witness was amply justified by the expectations engendered by the witness himself.

Insofar as the court is concerned, although it is unclear whether a prior agreement to testify is enforceable [see 8 Wigmore §2275 (3d Ed. 1940)], it is apparent that the

judge sought to confer immunity on the witness pursuant to Section 2477 of the New York Penal Law. The initial statement of that immunity was, of course, confusing in that it did not encompass the entire jurisdiction. The sole consequence of that mistake is simply that a subsequent conviction for contempt would not have been upheld [*People* v. *Brayer*, 6 App. Div. 2d 437 (1st Dept., 1958)]. It in no way changes the character of the good faith efforts by the court to compel the witness to testify pursuant to what it mistakenly believed to be an adequate grant of immunity.

In addition to the right of the judge to lay the foundation for a finding of contempt or perjury by asking a series of questions which the witness refuses to answer or answers falsely [*People* v. *Reila*, 7 N. Y. 2d 571 (1960); *People* v. *Breslin*, 306 N. Y. 294 (1954)], the court was entitled to determine whether the witness was refusing to testify because of fear of bodily harm rather than of future prosecution. Such grounds, of course, are insufficient in law to justify a refusal to testify. Supporting this possibility was the fact that the witness had previously given the prosecutor information pursuant to the same statement of immunity as that bestowed by the court initially, and as late as the evening before being called as a witness, had repeated to the prosecutor his previously expressed intention of testifying (2551). Both in the statement given to the assistant district attorney and on the witness stand, he had stated that he was in fear of being killed by the person to whom he gave the guns [clearly not one of these defendants]. That this was his real motive in refusing to testify is more strikingly evidenced by the fact that after it had

been explained to him that his immunity extended to Bronx County, he persisted in his refusal to answer.

It is obvious then, that the witness was hostile, and was, in fact, so declared by the court (2394). Establishing, on direct examination the reluctance of a witness to testify is perfectly proper (C. J. S., Witnesses, §368). This finding of hostility may be demonstrated by any competent evidence [*People* v. *Lane*, 9 App. Div. 2d 979 (3d Dept., 1959)], and it "is discretionary with the trial court as to what extent such an examination may go" (*id.* at 980). The fact that a witness now refuses to testify to that which he had related previously and had, in fact, promised to relate at trial, is surely competent evidence of present hostility.

The claims of prejudice and misconduct are further eroded by a feature so plain it may escape notice. The "coercive" tactic employed by the court to elicit testimony jeopardized only the rights of the witness himself. If an attempt was made to shield him by inadequate immunity, the defendants did not suffer. If he was threatened by punishment for contempt, the defendants did not suffer. The defendants suffered only from the testimony he eventually gave against them, and if its reliability was impaired by the means of elicitation, then the only pertinent question is: was the jury aware of it. And the answer here is, yes. That the witness asserted that he feared he himself might be incriminated by answering, obviously has no bearing on the incriminating effect against the defendants on trial. Moreover, realistically speaking, most testimony is produced by compulsion of some sort, if only the

compulsory command of a subpoena. Where the reluctance is greater, the efforts to produce proof must be intensified, if the jury is to learn the full facts. Such efforts are laudable, except insofar as they impinge on credibility. And in such cases, the jury is equipped to weigh the effects of the inducement. While considerably more dramatic, the events complained of, originating in good faith and supported by reason, occasioned no greater prejudice to the defendants than the testimony of the accomplice who was encouraged to testify by half fulfilled—and fully disclosed—expectations of leniency.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

FRANK S. HOGAN
District Attorney
New York County

H. RICHARD UVILLER
RAYMOND S. HACK
Assistant District Attorneys
Of Counsel

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